IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 780 OF 2004.

1. Dipti Kamlesh Daftary

2. Kamlesh Jaysukhlal Daftary ... Appellant.

V/s.

The Municipal Corporation of
Greater Mumbai. ... Respondents.

Y.S.Jahagirdar, senior counsel with P.K.Samdani i/b.
M/s.Kishore Thakordas & Co. for the appellants.

J.Xavier for respondent.

CORAM : V.C. DAGA, J.

DATED : 16th September 2004.

P.C. :

. Appeal is heard finally by consent of parties.

2. This appeal is directed against the order dated 23rd July, 2004 passed in Notice of Motion No.2062 of 2003 in Long Cause Suit No.2445 of 2002 by the City Civil Court at Bombay, dismissing the said notice of motion and thereby refusing to grant any interim relief in favour of the appellant/ original plaintiff.

3. The cause of action for the present suit is the notice dated 16th June, 2001 issued by respondent No.1 - the Municipal Corporation of Greater Mumbai ("Corporation" for short) under section 351 of the Bombay Municipal Corporation Act, 1888 ("B.M.C.Act" for short) directing demolition of the suit structure. The suit structure described in the plaint is as under:

> The suit structure is located at Fazalbhaiwadi, Erangal, Mandir Road, Malad (W). It has brick masonary walls of 10 ft. in the side and 14 ft. in between with roof of Manglore Tiles. (Details are at page 91 of the appeal memo)

4. The notice dated 16th June, 2001 issued by the Corporation was replied by a sketchy reply dated 20th June, 2001. Only time to produce relevant documents was sought. Thereafter, another reply dated Nil was filed enclosing therewith one affidavit said to be of one Mr.Tribhuvan V.Tiwari dated 28th June, 1990 along with one zerox copy of census certificate dated 2nd April, 1977 alleged to be issued by the Tahasildar (ENC), Borivli, I, Malad so as to connect the suit structure with the census structure said to be bearing No.PXXC-28/1/1, situate at Madh Erangle Road, Malad (W), Mumbai.

5. On receipt of the aforesaid reply, the Assistant Commissioner, P/North vide his order dated 20th May, 2003 was pleased to hold that the noticee has failed to produce authenticate documents showing that the notice structure is authorised one or is in existence since prior to 17th April, 1964. The suit structure under reference was treated as unauthorised structure liable for demolition.

6. The above order is a subject matter of challenge in L.C.Suit No.2445 of 2002 at the instance of the appellants/ original plaintiffs. In the said suit prayer for declaration with permanent injunction is made in terms of prayer clauses incorporated therein.

7. The plaintiff in the above suit has also moved notice of motion bearing No.2062 of 2003 to seek interim relief under order 39 rules 1 and 2 of C.P.C.

8. The trial Court after hearing both parties was pleased to hold that none of the documents related to the suit structure. Trial Court prima facie; found that no protection by way of interim

relief in favour of the plaintiff could be extended. With the result, notice of motion came to be dismissed vide order dated 23rd July, 2004. This order is subject matter of challenge in the present appeal from order.

9. Mr.Jahagirdar, learned senior counsel for the appellant, during the course of hearing, sought to place reliance on number of documents, such as agreement dated 1st January, 1997 between one Mr.Salim S.Fazalbhoy and Mrs.Dipti Kamlesh Daftary and Mr.Kamlesh Jaysukhlal Daftary said to be a document of lease. He also sought to place reliance on some other documents, like Census Certificate issued by Tahasildar, Borivli, Malad and letter dated 18th March, 1963 said to have been issued by the Assistant Engineer (Bldgs.)(Suburbs)Z-II of the Corporation. documents.

10. Mr.Jahagirdar, learned counsel for the appellant submitted that there is ample evidence on record to connect these documents with the suit structure and, if these documents are taken in to account, one has to conclude prima facie; that the suit structure was in existence on datum line. In his submission, trial Court committed an error by

refusing to grant interim relief, in absence of which suit itself would be rendered infructuous.

11. Per contra, Mr.Xavier, learned counsel for respondent No.1 - Corporation tried to support the impugned order and also tried to contend that most of the documents are bogus documents. He, ultimately, submitted that even though these documents are held to be genuine, still none of these documents can be connected with the suit structure. He further submits that in spite of grant of opportunity of hearing on show-cause-notice only one document was produced by the appellant before the Corporation, namely, affidavit of Mr.Tribhuvan V. Tiwari. If that be so, all these documents, which are sought to be relied upon before this Court, cannot be taken into account in the suit as the civil Court is not expected to act as appellate authority over the authorities under the provisions of the B.M.C.Act. In his submission, civil Court has only to examine as to whether or not the relevant material produced on record is taken into account and that the principles of natural justice are followed. The civil Court is not expected to substitute its own views in place of the order passed by the authorities under the B.M.C.Act.

12. Having heard rival parties, during the course of hearing, it was suggested to the learned counsel for the Corporation that a fresh look to all these documents can always be given by the Corporation authorities, namely, the Assistant Commissioner, P/North Ward, so that Corporation will have opportunity to look into the genuineness of the said documents and also to find out as to whether or not really these documents pertain to the suit structure. Mr.Xavier, learned counsel for the Corporation fairly stated that there would be no objection for the Corporation if this Court, by fixing time schedule, directs fresh consideration of the matter based on the documents produced before this Court so as to find out legality of the suit structure with liberty to pass fresh order.

13. Considering the fair approach adopted by the learned counsel for the Corporation, this Court feels that it would be in the interest of justice to permit the appellant to produce additional reply to the notice issued by the Corporation so that appellant would get fresh opportunity to file all necessary documents before the Corporation to establish her case. In this view of the matter,

looking to the consensus between the parties, without examining the merits or demerits of the order dated 20th May, 2003 (page 94), passed by the Assistant Commissioner, P/North Ward of the Corporation as also of the impugned order dated 23rd July, 2004 passed by the trial court, the same are set aside. The matter is remitted back to the Assistant Commissioner, P/North Ward of the Corporation for reconsideration in accordance with law following principles of natural justice.

14. In the result, appeal is allowed in terms of this order. It is hereby directed that within a period of four weeks from today the appellants shall file their additional reply with the Corporation along with all necessary documents sought to be relied upon in support of the reply. The Assistant Commissioner, P/North shall re-hear the appellants within 15 days thereafter and pass reasoned order dealing with all contentions and each and every document in detail following principles of natural justice. It is made clear that whatever documents the appellants intend to file should be filed within a period of four weeks from today. Thereafter, it would be open for the Corporation authority not to accept any document at the time of hearing. It is

further made clear that it would be open for the Corporation to use any adverse material, if found in their possession, with prior notice to the appellant. Needless to mention that all rival contentions are kept open. The Assistant Commissioner, P/North shall serve copy of the adverse order, if any, on the noticees through messenger as also by registered A.D.

15. It is needless to mention that in the event of any adverse order, appellant shall be at liberty to take appropriate legal action in accordance with law.

16. At this stage, learned counsel for the appellant is seeking permission to withdraw suit pending on the file of the trial Court being L.C.Suit No.2445 of 2002 as the cause of action for prosecuting the suit does not survive in view of this order. Accordingly, appellant is allowed to withdraw her suit being L.C.Suit No.2445/2002 with no order as to costs.

17. Appellant undertakes to produce copy of this order before the trial Court so as to enable trial Court to show formal disposal of the suit. In the

event of appellant's producing copy of this order, the trial Court is directed to show formal disposal of the suit as withdrawn with no order as to costs.

18. Appeal stands disposed of in terms of this order with no order as to costs.

19. All the concerned to act on ordinary copy of this order duly authenticated by the Associate/ Personal Secretary of this Court.

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